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CLERK

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FOURTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.**

IN THE

Supreme Court of the United States

622
NO. TERM, 194...

THE DRAVO CONTRACTING COMPANY,
a Corporation, Petitioner,

v.

ERNEST K. JAMES, as an Individual and as State Tax
Commissioner of the State of West Virginia,
Respondent.

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PEALS FOR THE FOURTH CIRCUIT.**

*To the Honorable Charles Evans Hughes, Chief Justice,
and the Associate Justices of the Supreme Court of
the United States:*

The petition of The Dravo Contracting Company, a
corporation, respectfully shows:

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Summary and Short Statement of the Matter Involved.

This is a suit in equity brought in the District Court
of the United States for the Southern District of West
Virginia by The Dravo Contracting Company, your peti-
tioner, as plaintiff, against respondent, as an individual
and as State Tax Commissioner of the State of West

Virginia, to restrain the collection of privilege taxes assessed against your petitioner in the amount, including penalties, of \$135,761.51.

The District Court decreed petitioner liable for taxes in the principal sum of \$63,214.25, with interest, as hereinafter set forth. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed this decree and remanded the case under an order that would result in a tax upon petitioner of \$108,814.67.

The statute involved herein is known as the Gross Sales and Income Tax Law of the State of West Virginia. It provides for "annual privilege taxes" on account of "business and other activities" and imposes, upon every person engaged or continuing within said state, in the business of contracting, a tax "equal to two per cent (2%) of the gross income of the business".

Your petitioner is a Pennsylvania corporation engaged in the general contracting business. Its principal office and plant are at Pittsburgh, Pennsylvania. It is admitted to do business in West Virginia. During the years 1932 and 1933 your petitioner entered into four contracts with the United States for the construction of locks and dams in the Kanawha River and locks in the Ohio River within the territorial limits of West Virginia.

Each contract required the petitioner to furnish all labor and materials and to perform all work required "for the consideration of the sum based on designations and unit rates specified in the schedule appended" to each contract. In other words, these contracts were unit price contracts. The items designated for unit price payments consisted generally of units of linear, square, cubic, or avoirdupois measurement of materials or work, together with lump sums for certain units of

machinery and equipment. Monthly or semi-monthly partial payments were provided for as the work progressed. In addition, further provision was made for the inclusion in said monthly partial payments of specified percentages of certain of the unit prices.

All payments under said contracts were received by petitioner at its office in Pittsburgh, Pennsylvania. None was received in West Virginia.

The activities of your petitioner in the performance of said contracts were carried on in part at the respective work sites in West Virginia and also at its office and plant in Pennsylvania and elsewhere outside West Virginia. The respondent, as State Tax Commissioner, assessed your petitioner with gross income taxes in the sum of \$135,761.51 (including penalties) for the years 1933 and 1934 upon the entire gross amounts received from the United States Government under those contracts.

This suit has previously been before this Honorable Court, *James v. Dravo*, 302 U. S. 134, upon an appeal by the present respondent from a decree by a statutory three-judge court granting a permanent injunction against the collection of the entire tax, upon the ground that the tax imposed an unconstitutional burden upon the operations of the Federal Government. Upon that appeal the decree of the lower court was reversed. In the majority opinion delivered by Mr. Chief Justice Hughes, this Court held that the tax imposed no unconstitutional burden upon the operations of the Federal Government and that, in so far as territorial jurisdiction was concerned, the state had authority to impose the tax upon the activities of your petitioner at the respective work sites within West Virginia. This Court further held, however, that unless the activities, which

were the subject of the tax, were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax and that, as the record disclosed activities not within the territorial limits of said state, an apportionment would, in any event, be necessary to limit the tax to activities over which the state had jurisdiction. The cause was remanded for further proceedings in conformity with said opinion.

Your petitioner thereafter renewed its application for an injunction in the District Court on the grounds that (1) the income attributable to its taxable activities was not ascertained or identified, and (2) the statute made no provision for an arbitrary or artificial method of apportionment. Respondent, on the other hand, contended that, under the opinion of this Court, petitioner's entire income, except certain partial payments made upon delivery of materials at petitioner's plant and upon fabrication thereof, was derived from taxable activities.

The District Court sustained petitioner's contention that the income attributable to its taxable activities was not ascertained or identified and expressly overruled respondent's contention that petitioner's entire income, with the exception of the partial payments specified, was derived from taxable activities. Said court, however, held that, under the opinion of this Court, some apportionment was mandatory, and disregarding the absence of statutory authorization, directed that petitioner's income be apportioned upon the basis of the ratio of petitioner's costs incurred within West Virginia, to petitioner's total costs in the performance of its contracts.

Without waiving their respective objections to the method of apportionment directed, the parties thereupon entered into a stipulation as to petitioner's costs.

After an allocation of certain disputed items by the court, a decree was entered, based on the cost ratio mentioned, adjudging your petitioner liable for taxes in the principal sum of \$63,214.25 with interest, as above stated. Both your petitioner and respondent appealed from said decree to the United States Circuit Court of Appeals for the Fourth Circuit.

The principal questions raised upon the appeal of your petitioner were (1) the validity of the method of apportionment adopted by the District Court, in the absence of statutory provision therefor; (2) whether the income attributable to petitioner's taxable activities within West Virginia was ascertained or identified through partial payments made or otherwise; and (3) if your petitioner's taxable income was not ascertained or identified, whether any apportionment could be made, in the absence of statutory provision therefor.

Upon his appeal, respondent again asserted that the partial payments specified were alone exempt from the tax.

On September 6, 1940, the Circuit Court of Appeals handed down its decision. In an opinion delivered by Parker, Circuit Judge, the Circuit Court held that, in the absence of statutory authorization, no method of apportionment could be devised and applied, and accordingly held that the apportionment made by the District Court on a cost ratio basis could not be sustained. Said court further expressly held that if any *method* of apportionment was necessary to separate, from the remainder, the portion of the income which the state had jurisdiction to tax, the tax would unquestionably be void in its entirety.

The Circuit Court of Appeals held, however, that this Honorable Court had theretofore sustained the tax,

although the point that the tax was imposed on income derived partly from out-of-state activities, with no provision for apportionment, was expressly raised and argued. This fact was held conclusive, not only as to the validity of the tax, but also as to the fact that no artificial method of apportionment was contemplated by this Court when the case was remanded.

The Circuit Court of Appeals further pointed out that, except for deliveries of material and the fabrication thereof at the Pittsburgh plant of petitioner, upon which partial payments were made, all activities upon which payments were made, occurred within West Virginia and, as a result thereof, concluded that the income derived from all payments made upon activities occurring within West Virginia was subject to the taxing power of the state.

The Circuit Court of Appeals accordingly concluded that the entire income of petitioner, except the relatively small partial payments made upon delivery of materials at petitioner's plant and upon the fabrication thereof, was taxable. Said court accordingly reversed the decree of the District Court and remanded the cause, directing the entry of a decree enjoining the collection of only those portions of the taxes assessed upon the income derived from the partial payments specified. Said decision, if permitted to stand, would render petitioner liable to taxes in the sum of \$108,814.67, as above stated.

A certified copy of the printed record of said case in the Circuit Court of Appeals, together with a supplement containing the proceedings in the Circuit Court of Appeals, are submitted herewith and made a part of this petition.

Your petitioner believes that the decision of the Circuit Court of Appeals in this case is erroneous and that this Honorable Court should require that said case should be certified to it for review and adjudication in accordance with existing laws. As reasons relied on for the allowance of the writ, it asserts:

First: The decision of the Circuit Court of Appeals, upon the question of the apportionment of the gross income of petitioner, a foreign corporation, for the purpose of the West Virginia annual privilege tax imposed on account of business and other activities in the business of contracting and measured by a percentage of the gross income thereof, holding that all payments made to petitioner *upon* activities or events occurring within West Virginia are taxable, without regard to the extent to which those payments were attributable to or derived from activities carried on outside West Virginia, is a decision of a federal question in a way probably in conflict with the decision of this Court heretofore made in this case and probably in conflict with other applicable decisions of this Court.

Second: That the decision of the Circuit Court of Appeals, which subjects to the operation of the statute known as the West Virginia gross sales and income tax, a large part of the income of your petitioner derived from activities carried on outside the territorial limits of the State of West Virginia is a decision of a federal question in a way probably in conflict with the decision of this Court heretofore made in this case and probably in conflict with other applicable decisions of this Court, and if permitted to stand, will result in the taking of your petitioner's property without due process of law in violation of Section 1 of the Fourteenth

*Petition.***Amendment of the Constitution of the United States.**

The position of your petitioner will be further elaborated in the supporting brief submitted herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case—No. 4654 June Term, 1940, on its docket—to the end that said case may be reviewed and determined by this Court as provided by law; that the order of said Circuit Court of Appeals be reversed by this Court; and that your petitioner may have such other and further relief as to your Honorable Court may seem proper.

THE DRAVO CONTRACTING COMPANY,

By WILLIAM S. MOORHEAD,
LAWRENCE D. BLAIR,
W. CHAPMAN REVERCOMB,
W. ELLIOTT NEFFLEN,
Its Solicitors.
